IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **Kempin, Christopher** Serial No. **10/712,677** Filed: **11/13/2003** For: **"Network Endpoint Health Check"**	Group Art Unit: **2153** Examiner: **PHAN, Tuankhanh D.** Customer Number: **25854**

BRIEF IN REPLY TO EXAMINER'S ANSWER

Commissioner for Patents
Mail Stop Amendment
P.O. Box 1450
Alexandria, VA 22313-1450

September 24, 2008

Sir,

Pursuant to 37 C.F.R. § 41.37, Appellant (Applicant in the above-styled matter) submits its Brief in Reply to the Examiner's Answer mailed on July 25, 2008.

ARGUMENT

1.   **With respect to the §112 rejections, the Examiner's Answer fails to address the amendments to the claims that were entered in the Advisory Action mailed on 12/31/2007.**

On November 30, 2007, Appellant filed an Amendment and Response to the previously-received final office Action and argued that the amendments overcame the §112 rejection. The Advisory Action mailed on December 31, 2007, indicated that the amendments had been entered for purposes of appeal. (*See*, Advisory Action, Checkbox 7).

However, the Examiner's Answer in responding to Appellant's arguments regarding the definiteness issue, refers to the limitations of Claim 1 and 11 without the new limitations amended into the claims. (*See, e.g.,* Examiner's Answer, p. 3 and p. 7)

The Examiner's Answer discussed only the pre-amended claims. While Appellant believes that even those claims were definite, those claims are not at issue in this Appeal. Appellant respectfully reminds the board that it should direct its attention to the claims as amended in the Amendment filed on November 30, 2007, rather than the pre-amended claims

discussed in the Examiner's Answer.

2.   With respect to the §112 rejections, the Examiner's Answer fails to support its assertion that use of functional language is improper.

Even if the arguments in the Examiner's Answer were to be applied to the amended claims as they currently stand, the Examiner's Answer completely fails to respond to the arguments presented in the Appeal Brief (*e.g.,* on p. 7) that demonstrate that, pursuant to MPEP §2173.05(g), functional language in a claim is perfectly acceptable.

Functional language is proper in a claim and, therefore, the §112 rejections should not be sustained.

3.   With respect to the §102(e) rejections, the Examiner's Answer fails to respond substantively to the arguments set forth in Appellant's Appeal Brief.

In response to the Appeal Brief argument, with respect to Claim 1, that the cited reference (Childress et al.) fails to disclose the limitation that requires the gateway device *not* to send a state change message to the server when the status of the endpoint is in the Removed state, the Examiner's Answer states that "Childress et al. teach that once the device has failed and a FATAL TEC event has been sent, there will no more messages since this is the highest threshold (¶115-116) and there is no additional health check or signal need to be processed if the node is down (¶0061, lines 3-8)." (Examiner's Answer, p. 9) However, even if, *arguendo*, this is accepted as a correct summary of Childress (which Appellant traverses), it still does not disclose the recited limitations in Claim 1. Nothing in the portion of Childress et al. cited in the Examiner's Answer discloses a gateway device selectively sending (or not sending) a state change signal to a server based on the current state of an endpoint.

Regarding independent Claims 7, 10 and 11, these claims each recite a gateway device that communicates with an endpoint and that characterizes the endpoint as being in one of three states: Healthy, Trouble or Removed. If the endpoint changes from the Healthy to the Trouble state, then the gateway device will send a state change signal to the server. If the endpoint

changes from the Trouble state to the Removed state, then the gateway device removes the endpoint from the monitored list and sends a second state change signal to the server indicating the removal of the endpoint. These claims recited a system that changes the state of an endpoint based on both the current state of the endpoint and the non-occurrence of an event relative to the endpoint.

The Examiner's Answer cites ¶¶0061, 0115 and 0116 of Childress et al. to assert that these limitations are disclosed in Childress et al. However, ¶0061 merely states that if a "managed node is down, no additional health-check modules are processed." It makes no mention of anything that changes a state of an endpoint and that removes an endpoint from a monitored list if the endpoint has been moved to a Removed state.

The relevant portion of ¶0115 states that "A first threshold may indicate that a Warning level TEC event should be sent, a second threshold may indicate that a Critical level TEC event should be sent, and a third threshold may indicate that a Fatal level TEC event should be sent, for example," which does seem to indicate that three different states are disclose in Childress et al. However, Childress et al. completely fails to disclose the basis of how an endpoint changes from one state to another, other than to say that the state is indicated by a "threshold."

The relevant portion of ¶0116 states that "[i]f an endpoint fails, it is probable that each of the above TEC events will be sent to the TEC server as the endpoint fails to check in within the various predetermined periods of time." This portion merely states that if an endpoint fails, the failure is reported to a server. However, it does not state that the failed endpoint is then removed from a monitoring list.

Also, the combination of t paragraphs 0115 and 116 still fails to disclose the limitations relating to the endpoint being set into a new state (*e.g.*, from Healthy to Trouble or from Trouble to Removed) as a result of its current state and the non-occurrence of an event. The Examiner's Answer fails to demonstrate that each of the limitations recited in the claims are met by Childress et al. Because these limitations are not disclosed in Childress et al., the §102 rejection should not be sustained.

CONCLUSION

For the reasons enumerated above, Appellant believes that the rejections were in error and requests that all rejections be reversed and that all remaining claims be allowed.

No addition fees are believed due. However, the Commissioner is hereby authorized to charge any additional fees which may be required, including any necessary extensions of time, which are hereby requested, to Deposit Account No. 503535.

September 24, 2008
Date

Bryan W. Bockhop
Registration No. 39,613

Customer Number: 25854

Bockhop & Associates, LLC
2375 Mossy Branch Dr.
Snellville, GA 30078

Tel. 678-919-1075
Fax 678- 749-7314
E-Mail: bwb@bockpatent.com